Minutes of the AOPA Committee of the Natural Resources Commission

December 8, 2006

AOPA Committee Members Present

Jane Ann Stautz, Committee Chair
Mark Ahearn
Bryan Poynter

NRC Staff Present

Sandra Jensen
Stephen Lucas
Debra Michaels

Call to Order

Jane Ann Stautz, Committee Chair, called to order the AOPA Committee of the Natural Resources Commission at 8:01 a.m., EST, on August 23, 2006 in Conference Room 2, Indiana Government Center South, 402 West Washington Street, Indianapolis, Indiana. With all three members of the Committee present, the Chair observed a quorum.

Approval of Minutes for Meeting Held on August 23, 2006.

The Committee discussed and approved by acclamation the minutes for the meeting that was held on August 23, 2006.

Consideration of Oral Argument with respect to Correspondence from Joe Bergan in response to "Findings of Fact and Conclusions of Law with Nonfinal Order of Summary Judgment" of Administrative Law Judge in *Joe Bergan v. DNR*, Administrative Cause No. 05-203D

The parties did not appear for this item. Following a brief discussion by the members of the Committee, Mark Ahearn moved to approve the ALJ's "Findings of Fact and Conclusions of Law with Nonfinal Order of Summary Judgment" as the findings of fact, conclusions of law and final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Oral Argument with respect to "Respondent Dennis Hill's Objection to Notice of Entering Findings of Fact and Conclusions of Law and Request to Re-Open Hearing to Allow Additional Evidence" and "Findings of Fact and Conclusions of Law with Nonfinal Order" of Administrative Law Judge in *Thomas S. Winterrowd v. Dennis Hill and Department of Natural Resources*; Administrative Cause No. 06-029D

The parties did not appear for this item. Following a brief discussion by the members of the Committee, Mark Ahearn moved to approve the ALJ's "Findings of Fact and Conclusions of Law with Nonfinal Order" as the findings of fact, conclusions of law and final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried.

Consideration of Oral Argument with respect to "Respondent Intervenors' Notice of Objections to Findings of Fact and Conclusions of Law with Nonfinal Order" and "Findings of Fact and Conclusions of Law and Nonfinal Order" of Administrative Summary Judgment in *Stephen L. Jansing* (Claimant) *v. Department of Natural Resources* (Respondent) *and Terry Hawkins, et al.* (Respondent Intervenors); Administrative Cause No. 04-009W

The parties appeared and presented oral argument to the AOPA Committee. Stephen Jansing appeared on his own behalf. The Department of Natural Resources was represented by its attorney, Ann Z. Knotek. The Respondent Intervenors were represented by their attorney, William W. Barrett and were present in the person of Terry Hawkins.

In accordance with an "Entry Regarding Objections that Aver the Occurrence of Inappropriate Ex Parte Communications and Entry Regarding Motion for Briefing Schedule and for Transcription", the services of a court reporter were provided by Debra Michaels. Upon an appropriate request by a party, a transcript of the recording would be prepared. The AOPA Committee announced that no additional oral argument would be received unless subsequently ordered by the Committee.

The AOPA Committee approved a schedule for post-argument briefing. Under this schedule, the parties are provided until January 8, 2007 to file contemporaneous briefs. Copies of the briefs were not required to be served upon the other parties or their attorneys.

Consideration of Oral Argument with respect to "Objections to Administrative Law Judge's Findings of Fact and Conclusions of Law with Non-Final Order" by Dean Ray and Thomas Blackburn and John Blackburn; with respect to "Objections to Findings of Fact and Conclusions of Law with Non-Final Order" by Wehrenberg Property Owners; and "Findings of Fact and Conclusions of Law with Non-Final Order" of Administrative Law Judge in *Dean Ray* (Claimant) *v. Thomas Blackburn, John Blackburn, Michael Lukis, James Wehrenberg, Kim Wehrenberg, Peter Wehrenberg, Holly Wehrenberg Oliver, Gretchen Wehrenberg Stewart and Thomas Scheele* (Respondents) *and Michael Lukis* (Cross and Counter Claimant) *v. Dean Ray, Thomas Blackburn, John Blackburn, James Wehrenberg, Kim Wehrenberg, Peter Wehbrenberg, Holly Wehrenberg Oliver, Gretchen Wehbenberg Stewart and Thomas Scheele* (Respondents) and "Findings of Fact and Conclusions of Law with Non-Final Order" by Administrative Law Judge; Administrative Cause No. 05-101W

The parties appeared and presented oral argument before the AOPA Committee. Counsel, George Martin represented Dean Ray, John Blackburn and Tom Blackburn. Kim Wehrenberg, counsel, appeared on behalf of the Wehrenberg property owners. Counsel, Stephen Snyder, represented Michael Lukis.

George Martin observed that increasing values associated with lakefront property have caused property owners to avoid any type of encroachment that might diminish that value. Martin explained that Lukis has imposed upon his neighbors a large pier, which interferes with his clients' and other neighbors' placement of temporary structures and impedes their access to Lake James. Martin asserted that in years prior to Lukis' ownership of property in the area, the remaining parties, who have owned their properties for "time immemorial," have had no unresolvable disputes concerning the placement of temporary structures.

Stephen Snyder, counsel for Lukis, disputes Martin's contention that no disputes arose in the past, pointing out particularly that Becker, the predecessor in title on the. Lukis' property, was involved in a dispute with the Blackburns regarding encroachment by the Blackburns upon him.

Martin displayed one of the stipulated exhibits admitted as evidence during the administrative hearing, which ultimately became Exhibit A to the Non-Final Order. This exhibit demonstrates the riparian zones determined by the administrative law judge for the Ray, Blackburn and Lukis properties. Martin stated, "Unfortunately, if you apply the case law [the administrative law judge] is just wrong…it's just wrong. She did not do it correctly." Martin argued that the riparian zones as determined by the non-final order essentially condemned Ray's property. "He has no value…that's called inverse condemnation in Indiana." Mark Ahearn inquired of Martin what he believes the case law does say.

According to Martin, through *Bath v. Courts*, Indiana adopted the principles set forth in *Nosek v. Stryker* for determining these types of cases. "You have got to achieve a just result," and the methods established by *Nosek* are tools for accomplishing that task. Martin argued that *Nosek* requires a determination that affords each riparian owner the ability to reach navigable water within his or her exclusive riparian zone. Three methods were set forth in *Nosek*, however, Martin explained that "you may have to amend them in a particular case" to achieve "exclusive access within a riparian zone to navigable water."

First, Martin explained that *Nosek* authorizes the extension of landward boundary lines lakeward in situations involving a straight shoreline with landward boundary lines perpendicular to that shoreline. Second, Martin discussed *Nosek's* methodology for addressing a straight shoreline where landward boundary lines are not perpendicular to the shoreline. In this instance, Martin characterized *Nosek* as requiring the extension of landward boundary lines at a right angle to the shoreline. Martin argued that the third method set forth in *Nosek*, which involves an "apportionment," is applicable to irregular shorelines such as in the instant proceeding. During Martin's discussion of apportionment in the context of the instant proceeding, he presented a diagram, which he acknowledged was not evidence admitted in the record but was a "schematic of the way it can be done." Jane Ann Stautz stated that "all we can act upon is the proposed order that is before us and the objection that has been brought as it relates to the testimony and information that has been put into evidence at the hearing."

Martin then argued that the apportionment method involves proportioning each riparian owner's share of the shoreline and applying those proportions to the "line of navigability." Then by "drawing straight lines from the termini of the navigable water line to the respective termini of the corresponding shoreline pertaining to each owner," the respective riparian zones are determined in proportion with their shoreline. According to Martin, apportionment would allow both Ray and the Blackburns to have access to navigable water from within their riparian zones.

Martin also argued that the covenants for the Gleneyre subdivision, referenced in the non-final order, are inapplicable to the instant proceeding. Furthermore, Martin raised the matter that Lukis purchased his property with knowledge, as expressed in Lukis' commitment for title insurance, that states the commitment was subject to the riparian rights of people of Lake James.

Wehrenberg argued that the Wehrenbergs are not involved in this proceeding because their riparian area is involved in this dispute, but instead because a sailboat owned by the Wehrenbergs is alleged to be located within the riparian area of Lukis. Wehrenberg displayed a photograph, identified as administrative hearing exhibit L3, depicting the sailboat immediately in front of the

Lukis pier and explained that the non-final order concludes that the Wehrenbergs did not contend that the sailboat was in the riparian area of Lukis, which Wehrenberg described as "clearly an error" based upon the photograph. Furthermore, Wehrenberg argued that within the Wehrenbergs' brief in support of their objections, they specifically state that the sailboat was located within the Lukis riparian area. In order to establish adverse possession a person must show "control, intent, notice and duration." Wehrenberg argued that the Wehrenbergs had met the criteria for establishing adverse possession as to the sailboat's placement against Lukis' riparian rights. Wehrenberg further argued that any evidentiary difficulty with respect to proof of the location of the sailboat resulted from Lukis' removal of the anchor, which constituted "spoiliation" of evidence. Wehrenberg stated, "we don't see how there could be a determination that there was not adverse possession in this case."

The Wehrenbergs' second objection pertained to the determination in the non-final order that the sailboat presented a safety issue because of its location with respect to Mr. Lukis' pier. Mr. Wehrenberg identified evidence from Ray and the Blackburns to the effect that the sailboat did not present a problem for them and that only Lukis had complained about the sailboat's location.

Thirdly, the Wehrenbergs objected to any determination of the Scheele and Wehrenberg riparian areas because these area were "never in controversy in this case, the only reason Wehrenberg and Scheele are in these cases is because Wehrenberg has a sailboat in Lukis' riparian area and Scheele had a raft that was allegedly within Lukis riparian area, therefore there should be no determination of what the Wehrenberg and Scheele riparian areas are because we were not given an opportunity to present any evidence on that issue."

Finally, Wehrenberg agreed with Martin's reliance upon an apportionment method for determining the parties' riparian rights.

Stephen Snyder disputed that the area in question is actually a cove. Instead, he urged that the area of lake frontage belonging to Ray, the Blackburns, the Wehrenbergs and Scheele is curved with that curvature ending at the Blackburn property and then "straightens out" in the area of Lukis' lake frontage. Snyder argued that there is "some question as to how far you can apply *Nosek*." Snyder characterized the non-final order as an attempt to "compromise based upon what was owned at the shoreline by the various parties involved." Snyder identified the shoreline footage of each of the other parties in comparison to the much greater expanse of shoreline owned by Lukis. Snyder conveyed that Lukis paid for his property as did, presumably, the remaining parties and argued that the parties each got what they paid for. However, in Snyder's view the remaining parties now seek through this proceeding to gain space from someone else, namely Lukis.

Snyder argued that there is no such thing as exclusive rights of a riparian owner as to the public, citing the Natural Resources Commission's prohibition on "U" shaped piers for the reason that such a pier would exclude the public from a portion of the lake. However, Snyder acknowledged the existence of exclusivity as it relates to riparian neighbors. By example, Snyder presented the scenario of a three foot shoreline at which a person seeks to place "an eight and a half foot wide pontoon boat, an eight foot wide speed boat… at what point does that three feet widen to twenty-five feet. That's what these gentlemen are asking you to do."

Snyder argued that no evidence was presented by which it could be concluded that any of the parties can not reach navigable waters. However, Snyder pointed out that to afford each riparian owner a riparian zone consistent with the method sought by Martin and Wehrenberg, "everybody would be out there buying a little three foot strip to the lake because your rule would then say that

the adjacent property owner has to give up his rights to the extent that the owner of the three foot wide property needs more so that he can access navigable waters."

Snyder pointed out that as originally platted the Ray and Wehrenberg properties were one lot with sixty (60) feet of shoreline, but were subsequently divided. In Snyder's opinion, but for the division of that lot, "we would not be here."

Snyder argued that the non-final order actually placed a larger burden upon Lukis by requiring the removal of a boat lift from the east side of his pier and prohibiting the placement of anything, including the docking of a boat, on east side of his pier. This provides approximately twenty-two feet of Lukis' riparian area for the purpose of allowing the adjacent property owner to access his pier.

Snyder argued that riparian rights as determined in the non-final order are directly proportionate to the amount of shoreline owned by each party. The fact that a riparian owner wants to place structures into the lake that are larger than the area available is not justification for expansion of riparian rights as sought here. Snyder concluded that *Nosek* was applicable and had been properly applied by the administrative law judge.

Martin argued in rebuttal that Ray and the Blackburns are not asking for more, only for the AOPA Committee to apply the law and provide them access to navigable waters. Martin further argued that Snyder was correct in his position that riparian rights should be in direct proportion to the amount of shoreline owned but that the administrative law judge failed to determine the riparian rights consistent with the proportion of their shoreline.

Wehrenberg reiterated on rebuttal that an apportionment involving the use of a line of navigability would have properly identified the parties' respective riparian zones.
Mark Ahearn expressed that the role of the AOPA Committee is to review the administrative law judge's order and determine whether something has been presented through briefing materials or oral argument that would prompt the vacation or modification of that order. Ahearn indicated that he had received no information that caused him to believe the order should be vacated or modified and moved to affirm the non-final order. Jane Ann Stautz agreed stating that the extension of the boundary lines provides each of the parties with access to navigable waters in proportion to their lake frontage although they may not be able to accommodate all of the watercraft they might desire.

Bryan Poynter asked the administrative law judge how it was decided to establish the parties' riparian zones as depicted in Exhibit A to the non-final order. The administrative law judge responded that the exhibit was stipulated into evidence at the administrative hearing and stated her agreement with the applicability of *Nosek*. Further, ALJ Jensen explained that with the irregularity of the shoreline some type of proportioning would have to be undertaken. Despite the lengthy discussion presented for the AOPA Committee's benefit, the administrative law judge emphasized that there was no evidence presented by the parties during the administrative hearing regarding the concept of "line of navigability." There was evidence in the record confirming that the depth of the water would allow Ray and the Blackburns to navigate watercraft in those zones, despite the zones being restricted to areas near the shoreline. There was no issue here that watercraft needed to be placed some distance from the shoreline in order to navigate. "While they are not perfect apportionments … the riparian zones came out at least in general terms consistent" with each parties lake frontage. "It seemed like the best option available" based upon the evidence that was in the record.

Wehrenberg inquired as to whether the motion to affirm the non-final order included affirmation of the determination that adverse possession had not been established with respect to the sailboat's location within Lukis' riparian zone. ALJ Jensen confirmed that the issue of adverse possession associated with the sailboat was an issue ripe for consideration by the AOPA Committee. The ALJ summarized her findings as concluding that the sailboat was located in an area of overlapping riparian interest of the Wehrenbergs and Lukis, and the non-final order required the sailboat to be relocated to an area nearer to the Wehrenberg's shoreline and outside of Lukis' riparian zone. Wehrenberg again maintained that any determination that the sailboat was not located within Lukis' riparian zone was in error. Snyder clarified, citing finding 97 of the non-final order, that the Wehrenbergs during the administrative hearing never contended that the sailboat was located within Lukis riparian area. After further discussion on this point initiated by Wehrenberg, the ALJ noted that in their proposed findings of fact and conclusions of law with proposed order at proposed findings 21 and 22, the Wehrenbergs in defending against Mr. Lukis' complaint "specifically state that their sailboat was not in the riparian area of Lukis. Despite what the evidence showed at hearing, despite the photograph that has been shown and was admitted in evidence" the Wehrenbergs maintained that the sailboat was not in the riparian area of Lukis. Wehrenberg pointed out that the Wehrenbergs did dispute the conclusion that the sailboat was not within the riparian area of Lukis in their objections. The ALJ noted that the position adopted by the Wehrenbergs on objections before the AOPA Committee, which the administrative law judge noted were filed after the evidence was received at the administrative hearing and after the non-final order had been issued, was contrary to the evidence presented by Wehrenbergs during the administrative hearing and in their proposed findings of fact and conclusions of law.

Mark Ahearn moved to approve the ALJ's "Findings of Fact and Conclusions of Law with Non-Final Order" as the findings of fact, conclusions of law and final order of the Natural Resources Commission. Jane Ann Stautz seconded the motion. Upon a voice vote, the motion carried. Bryan Poynter voted against the motion.

Consideration of Oral Argument with respect to "Claimant Save Our Rivers, Save Our Land & Environment, and Don Mottley's Objection to the Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment"; "Respondent DNR's Objections to the Findings of Fact, Conclusions of Law and Nonfinal Order on Summary Judgment Dated August 24, 2006; "Intervenor/Respondent Rockport River Terminals, Inc.'s Objections to the Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment of the Administrative Law Judge Dated August 24, 2006" and "Findings of Fact and Conclusions of Law with Non-Final Order on Competing Motions for Summary Judgment" in *Save Our Rivers, et al. v. City of Rockport, Department of Natural Resources and Rockport River Terminals, Inc.*; Administrative Cause No. 05-082W

The parties appeared and presented oral argument before the AOPA Committee. Counsel, Joel Weineke, represented Save Our Rivers, Save Our Land and Environment, Don Mottley, as well as the Duncans and the Michels, who Weineke indicated are members of Save Our Rivers. Dennis Conniff, counsel, appeared on behalf of Rockport River Terminals, Inc. and Ihor Boyko, counsel, appeared for the Department of Natural Resources.

Weineke indicated that the non-final order addresses the Claimtant's concerns that the Department of Natural Resources "had not done their job in evaluating this coal combustion waste… that was going to be placed in the floodway of the Ohio River." Furthermore, the Claimants would have likely withdrawn their objections if not for the competing objections filed

by Rockport River Terminals and the Department. Mr. Weineke argued that the Claimants' objections center on their position that the administrative law judge "should have granted summary judgment on the fact that the fill project would actually violate the flood control act not just the fact that DNR failed to do its analysis in determining whether it would violate the flood control act."

Mark Ahearn sought clarification of the Claimant's objections to which Mr. Weineke stated the Claimants position was that the project would actually violate the flood control act. "Judge Jensen … found that DNR had failed to do the appropriate analysis in order to ascertain whether coal combustion waste, a contaminant, would constitute an unreasonable hazard to the safety of life and property …"

Weineke argued that on the motion of Rockport River Terminals certain paragraphs of Charles Norris' affidavit, evidentiary material submitted in support of the Claimant's motion for summary judgment, were stricken inappropriately by the administrative law judge. Additionally, the Claimants' argued that the determination that the portion of Don Mottley's affidavit, in which he states that the source of the coal combustion waste to be used as fill for the project was American Electric Power, was hearsay was also inappropriate. Weineke argued that the inappropriate determinations by the administrative law judge with respect to Mottley's affidavit resulted in the Claimants inability to present waste analyses associated with coal combustion waste from American Electric Power. The waste analyses that ultimately were not admitted as evidence on summary judgment would have shown that the coal combustion waste has been characterized by IDEM as a Type I waste, which is "the most toxic of all the restricted waste types and it requires, typically when IDEM is handling it under the Solid Waste Management Board, it typically requires several protections to be used… liners, collection of the leachate, prevention of water from flowing onto it and other requirements."

Weineke argued that the evidence, inappropriately stricken from the record, was sufficient for a determination that the project presented an unreasonable detrimental affect upon fish, wildlife and botanical resources and presented an unreasonable hazard to the safety of life and property, in light of the fact that the project occurs in a floodway, which is prone to be inundated by water and also occurs on top of the Ohio alluvial aquifer.

However in support of the non-final order's conclusion Weineke noted that the DNR's biologist, who completed the environmental review of the permit, acknowledged in his report that "the use of coal ash as fill may have negative affects and has been criticized in the public hearings but I don't have a contaminants background so someone else needs to address that." Additionally, according to Weineke, through interrogatories served upon the Department it becomes apparent that no analysis was conducted to ascertain the effects the coal combustion waste as a contaminant but instead the Department relied solely upon the prohibition placed on IDEM to regulate coal combustion waste as solid waste.

In response to the Department's objection, which raises the issue that the administrative law judge did not, in the non-final order, provide a template for the analysis appropriate to determine the affects of the placement of contaminants within a floodway, Mr. Weineke argued that a template already exists through reference to the *Wells* case cited in the non-final order.

Conniff stated that in addressing this matter there are two issues to be taken into consideration. First, he argued that it is necessary to consider the nature of the project, which he described as an engineered structural fill that will be constructed in the floodway consisting of partially, but not solely, of coal combustion byproducts. Conniff explained his characterization of the fill material

proposed for use in the project as coal combustion byproducts instead of coal combustion waste. Coal combustion byproducts, he explained, are "well recognized and can be used in a beneficial way such as in a structural fill and they do not constitute waste." As an engineered structural fill there are various aspects, including compaction, which will prevent leaching. Conniff argued that various aspects of the design make it a good project for the location involved.

Secondly, he observed it is the Claimants' allegation that the project "will, in fact, violate the Flood Control Act." Conniff notes finding 75 of the non-final order, in which the administrative law judge determined that the Claimants presented no evidence relating to the use of coal combustion waste as structural fill. Additionally, Conniff directed the AOPA Committee's attention to finding 78 of the non-final order, which concludes that the potential for unreasonable detrimental affects upon fish, wildlife and botanical resources and the threat to health and safety must be based upon site specific characteristics. Conniff concluded that the Claimants presented no site specific data to support their motion for summary judgment. Weineke objected to Conniff's conclusions, stating that the use of this fill on top of the Ohio alluvial aquifer constitutes some evidence of the site conditions existing in the area.

Conniff presented the AOPA Committee with two "primary objections." First, Rockport River Terminals objected to the determination that it had not produce sufficient evidence to support its motion for summary judgment. Conniff explained that as he understood the non-final order the sole reason for the conclusion that the Department did not conduct an adequate review focused on the statement of Daniel Gautier, the environmental biologist who stated in 2004 that he did not have a contaminants background.

However, Conniff notes, in opposition to Gautier's earlier qualification, that Gautier executed an affidavit in 2006 in which he provides an "unqualified endorsement that in his opinion this project did not constitute an unreasonable hazard or present unreasonable affects" provided that certain conditions contained within the approved permit were met. According to Conniff, Gautier's affidavit was unrebutted by the Claimants. Furthermore, Conniff noted the affidavit of Hebenstreit, which was also presented as evidence on summary judgment by Rockport River Terminals, in which he expresses his opinion that the project will not result in unreasonable hazards or unreasonable detrimental affects. Again, Mr. Conniff argues that Mr. Hebenstreit's affidavit was unrebutted by the Claimants. Conniff then cited the administrative law judge's determination that there was insufficient evidence provided by the Claimants to establish that the project would, in fact, result in unreasonable detrimental affect to fish, wildlife and botanical resources or an unreasonable threat to the safety of persons or property.

Conniff concluded that if Rockport River Terminals failed to provide sufficient evidence to prevail on its motion for summary judgment, "at worst that creates a genuine issue of material fact." We've illustrated that a review was conducted by DNR that took into account all aspects of the project, it is obvious that they were aware as to the potential for contaminants present in the material, yet they reviewed that… they approved it…" Ultimately, Conniff urged that the non-final order should be reverse and summary judgment should be granted in Rockport River Terminals' favor or alternatively a determination should be made that genuine issues of material fact exist and the matter should be remanded for a hearing on those issues. The issues as stated by Conniff include whether the Department conducted an adequate review and whether the project will result in unreasonable hazard or unreasonable detrimental affects or hazards to the safety of persons or property.

Boyko explained that the Department maintains three objections to the non-final order. First, Boyko cites an inconsistency between finding 78 in which it is determined that the Claimants did

not consider the site conditions and did not meet their burden of proving that unreasonable detrimental affects or a threat to the safety of people or property would result. In comparing that to a determination that the Claimants bear the burden of proof in establishing that no genuine issue of material fact existed on that point, Boyko concludes that a grant of summary judgment on the basis of inadequacy of the Department's review was in error. "The fact that the Claimants failed to meet their burden of proof is further supported by the fact that [DNR] is given no guidance in terms of scientific testing or what methods [DNR} is to use to guide [DNR] in reviewing this permit on remand."

With respect to finding 97 through 100 of the non-final order Boyko cites the administrative law judge's use of the general language dictionary in determining that coal combustion byproducts were a contaminant. Using the broad definition of contaminant found in the general language dictionary nearly any substance, even benign or non-hazardous materials, could be viewed as a contaminant. Mr. Boyko cited IC 13-19-3-3(2)(e), which prohibits the regulation of coal combustion byproducts as a solid waste when used for beneficial purposes such as structural fill.

Boyko lastly cited objections to findings 118 through 122 of the non-final order. He again refers to statutory prohibitions on the regulation of coal combustion byproducts as a solid waste when used as structural fill.

Weineke, on rebuttal, reiterated that Gautier clearly indicated his lack of knowledge and inability to review the contaminants issue involved with the project and further noted the Department's confirmation through responses to interrogatories that it had no chemist, no toxicologist, or other such expert to review this permit.

Noting that summary judgment is a "very powerful tool," Mark Ahearn offered that an order consistent with Conniff's suggestion that genuine issues of material fact exist that warrant a hearing. The administrative law judge inquired whether it was the intent to reverse the determination that the project as approved would not adversely affect the efficiency or unduly restrict the capacity of the floodway because no party had objected to that particular finding. Jane Ann Stautz moved to grant summary judgment as set forth in finding 123 that the project as approved will not adversely affect the efficiency or unduly restrict the capacity of the floodway, deny the summary judgment granted to the Claimants and remand that and "have a full hearing conducted with regard to the appropriateness and thoroughness of the analysis and the other objections that have been brought before us." Ahearn seconded the motion. Upon a voice vote, the motion carried.

Consideration of Oral Argument with respect to Informal Objections by Respondent's Representative and "Findings of Fact and Conclusions of Law with Non-Final Order" of Administrative Law Judge in *Department of Natural Resources, Division of Oil and Gas v. William E. Hill, d/b/a Hill Oil Company*; Administrative Cause No. 06-009G

The parties appeared and presented oral argument before the AOPA Committee. Bonnie Bergstrom appeared on behalf of William Hill, doing business as Hill Oil Company. Counsel, Ihor Boyko, appeared on behalf of the Department.

Bergstrom explained that two of the permits, 18045 and 17183, identified for revocation in the non-final order are located on her farm and indicated her desire to keep those two permits. Bergstom further indicated her intention to find an operator to whom she can transfer the permits and lease the wells.

Boyko indicated that some of the violations at issue in this proceeding have been ongoing since 2005 and the violations have not been abated in that time. Boyko noted that the revocation of the permits would not prevent Bergstom from leasing the wells to an operator at a later time. However, following revocation of the existing permits a new operator would be obligated to seek new permits.

Jane Stautz clarified that the non-final order required the wells to be plugged, which would prevent the operation of the wells in the future. She moved to amend the proposed order to remove permits 18045 and 17183 for a period of 90 days to allow Bergstrom to find an operator and facilitate the transfer of the permits. In all other respects the proposed order would be affirmed. The administrative law judge was granted continuing authority with respect to permits 18045 and 17183. Ahearn seconded the motion. The motion carried by voice vote.

Adjournment

Jane Ann Stautz called for adjournment at approximately 12:35 p.m.